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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the 2003-2004 Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2003-2004 administrative review of the antidumping duty order on stainless steel sheet and strip (S4) in coils from Mexico (A-201-822). As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

Adjustments to Normal Value
- Comment 1: Peso-Based Interest Rate for Home Market Sales
- Comment 2: Whether Home Market Database is Complete

Adjustments to United States Price
- Comment 3: U.S. Indirect Selling Expenses
- Comment 4: Mexico-incurred Indirect Selling Expenses

Cost of Production
- Comment 5: General and Administrative Expenses
- Comment 6: Adjustment to Major Input Analysis
- Comment 7: Financial Expense Calculation

Margin Calculations
- Comment 8: Offsetting for Export Sales that Exceed Normal Value
- Comment 9: Circumstance of Sale Adjustment

Background

On August 8, 2005, we published in the Federal Register the preliminary results of the administrative review of S4 in coils from Mexico for the period July 1, 2003, through June 30, 2004. See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 70 FR 45675 (August 8, 2005) (Preliminary Results).

This review covers one manufacturer/exporter of stainless steel sheet and strip in coils, ThyssenKrupp Mexinox S.A. de C.V. (Mexinox). We invited parties to comment on our Preliminary Results of this review. We received case briefs from the respondent, Mexinox, and Allegheny Ludlum, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization, Inc .and the United Steelworkers of America, AFL-CIO/CLC (collectively, petitioners) on September 7, 2005. We received rebuttal briefs from Mexinox and petitioners on September 14, 2005.

Discussion of the Issues

**Adjustments to Normal Value**

***Comment 1: Peso-Based Interest Rate for Home Market Sales***

Mexinox contends that the Department was inconsistent in its practice of imputing credit expenses and establishing the currency of sale for certain home market sale transactions. Mexinox states that it reported U.S. dollar invoice prices within the variable field GRSUPRUH, and the Mexican peso prices within variable field GRSUPRH. Mexinox maintains that, by using the peso-based unit prices in GRSUPRH, the Department has merely converted these sale prices to U.S. dollars using the exchange rate in effect on the date of the comparison sale. Mexinox insists that such a conversion ignores the true value of the invoice price in dollars as reported in GRSUPRUH and creates a distortion in the converted amount (GRSUPRH). Mexinox contends that this methodology fails to accurately reflect the U.S. dollar amount invoiced to customers. Mexinox argues that the Department should use the invoiced U.S. dollar amounts as reported in GRSUPRUH for purposes of normal value (NV), while asserting that the Department should also use the U.S. dollar interest rate to calculate imputed credit expenses and apply that rate to these U.S. dollar prices in GRSUPRUH. See Mexinox Case Brief at 21.

Mexinox argues that if the Department continues treating these home market sales invoiced in U.S. dollars as peso-denominated sales (using GRSUPRH for purposes of NV as done in the Preliminary Results), Mexinox argues the Mexican peso-based interest rate (CREDITH) should be used for calculating imputed credit expenses for all home market sales. Mexinox claims that the Department erroneously calculated imputed credit expenses by applying the U.S. dollar short-term interest rate used in field CREDIT2H to GRSUPRH in the Preliminary Results. Mexinox refers to Import Administration Policy Bulletin 98/2 ("Imputed Credit Expenses and Interest Rates" (February 23, 1998)) which states that credit expenses should be based on a short-term

borrowing rate tied to the currency of the sale. Mexinox contends that the Department should be consistent in selecting the currency of the sale and corresponding short term interest rate. See Mexinox Case Brief at 24.

Petitioners state that since these home market sales were transacted in U.S. dollars, the opportunity cost must also be based on dollar interest rates. Petitioners argue that it is incorrect to classify U.S. dollar invoiced sales as peso-based sales solely because invoices are reflected in pesos in Mexinox's books and records. Petitioners maintain that a dollar price due on accounts receivable is a dollar-denominated asset to Mexinox; thus petitioners contend, the opportunity cost must be based on the U.S. dollar interest rate. Petitioners therefore argue that the Department should not use a peso-based interest rate for home market sales invoiced in U.S. dollars.

Petitioners acknowledge the importance of consistency in Department practice and argue that if in fact the Department does decide to base NV on the dollar prices for those dollar-denominated home market sales (GRSUPRUH), the Department should also use dollar-denominated billing adjustments (BILLADJ1UH and BILLADJ2UH) as reported by Mexinox. To maintain consistency, petitioners argue that the Department should calculate imputed credit expenses using the reported U.S. dollar-denominated interest rate and apply that rate to the dollar-denominated sale prices (GRSUPRUH). See Petitioners' Rebuttal Brief at 8-9.

**Department's Position:** We agree with both petitioners and respondent in part. In our calculation of imputed credit we have applied short-term interest rates to sales in their respective currencies. In addition, we have based the prices and billing adjustments on the currency as invoiced by Mexinox.

According to our standard practice, we determine the currency of a sale transaction based on evidence "determining the amount the purchaser ultimately would pay." See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 66 FR 45279, 45280 (August 28, 2001) (Stainless Steel from Korea). See also Final Determination of Sales at Less Than Fair Value: Fresh Cut Flowers From Columbia, 60 FR 6980, 7006 (February 6, 1995) (where the Department found the currency of the sale to be in U.S. dollars "since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar value"). In making a determination, the Department looks to evidence such as the dollar amount appearing on the sales invoice, the prices fixed on the date of sale, and the denomination of the invoiced and received payment for the sales in question. See Stainless Steel from Korea 66 FR at 45280. See also Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seemless Standard, Line and Pressure Pipe From Mexico, 65 FR 39358 (June 26, 2000) and accompanying Issues and Decision Memorandum at Comment 8.

Pursuant to 19 C.F.R. 351.410(c), the Department makes adjustments to NV for differences in circumstances of sale for credit expenses. It is the Department's normal practice to base calculations of imputed credit expenses upon the short-term interest rate tied to the currency of the sale. See Import Administration Policy Bulletin 98/2 ("Imputed Credit Expenses and Interest Rates" (February 23, 1998)). When Mexinox negotiates prices and sets invoices in either U.S. dollar or pesos, it foresees and incurs an opportunity cost linked to the currency of that sale. As indicated above, it is the Department's practice that the currency denomination on the invoice is the determinative factor in establishing the currency of the sale transaction at issue. Thus, we will calculate imputed credit expenses based on the short term interest rate tied to the currency of that sale. That is, U.S. short-term interest rates will be applied to U.S. dollar denominated invoice prices, and peso-denominated interest rates will be applied to peso-denominated invoice prices in calculating imputed credit expenses. See Final Analysis Memorandum dated December 6, 2005.

During the period of review, Mexinox invoiced its home market customers in both pesos and U.S. dollars. See Mexinox's November 10, 2004 Questionnaire Response at B-24. The Department finds that the amount fixed on the invoice at the date of sale denotes the currency of the sale transaction. The fact that for accounting purposes all sale invoices were booked and carried in pesos, and customers retained the legal right to pay U.S. dollar-denominated invoices in pesos, is immaterial in determining the currency of the sale transaction. Even if a customer paid a U.S. dollar-denominated invoice in pesos, the amount due is merely the peso-equivalent of the dollar obligation on the date of payment. Thus, we find that the negotiated and invoiced price represents the real payment obligation of the buyer and the true asset value to the seller. Accordingly, for these Final Results we have based all gross unit prices and applicable billing adjustments used in our margin analysis on the currency of the associated sale invoice at issue. By using actual U.S. dollar-denominated home market invoice prices for comparison purposes to U.S. sales we avoid any conceivable distortions due to exchange rate differences.

***Comment 2: Whether Home Market Data base is Complete***

Petitioners argue that the Department's antidumping questionnaire requires Mexinox to report the downstream sales made by its home market affiliated resellers. Petitioners note that the conditions for being excused from reporting downstream sales are subject to either 1) sales to all affiliates in the home market totaling less than five percent of home market sales; or 2) sales to an affiliated reseller passing the Department's arm's-length test. Petitioners allege that neither condition has been met, since sales to all affiliates exceeded the five percent threshold and sales to the affiliated reseller failed the arm's length test. Petitioners claim that Mexinox should report its affiliate Mexinox Trading's downstream sales of subject merchandise and such data should be used for the Final Results. See Petitioner's Case Brief at 7.

Mexinox rebuts that the Department has exempted Mexinox from reporting downstream sales in each review since the first administrative review and that the quantity of sales over this POR is

substantially smaller than reported in previous reviews. Mexinox notes that sales to affiliated end-users have never been an appropriate part of the calculus as to whether Mexinox should report downstream sales by affiliated resellers. Accordingly, Mexinox states that the Department properly focuses on the percentage of total sales represented by examining only sales to Mexinox Trading (the only potential candidate for downstream sales reporting). Mexinox contends the quantity of sales at issue for downstream reporting is minuscule and there is no evidence that the exclusion of these sales in any way affects the accuracy of the margin calculations. See Mexinox's Rebuttal Brief at 16.

**Department's Position:** Based on our review of Mexinox's submissions, the Department concludes that Mexinox S.A. need not report "downstream" sales made by affiliated resellers in the home market due to their small sales volume. Mexinox reported sales to two affiliated parties in the home market, Mexinox Trading and Fischer Mexicana S.A. de C.V. (Fischer Mexicana), both of whom are affiliated with Mexinox S.A. under the meaning of section 771(33) of the Tariff Act of 1930, as amended (the Act). Pursuant to 19 CFR 351.403(d), downstream sales by home market affiliates are normally excluded from the NV calculation if either of these two conditions are met: (1) sales account for less than five percent of the exporter's or producer's home market sales; or (2) sales are made at a price comparable to the price at which the exporter or producer sold the foreign like product to an unaffiliated party. Based on record evidence, Mexinox's affiliated home market customer, Fischer Mexicana, purchased subject merchandise for manufacturing purposes; however, it did not resell any subject merchandise during the POR. See Section A Questionnaire Response (AQR) dated October 8, 2004, at A-14 and Mexinox Rebuttal Brief at 13.

Moreover, Mexinox's only other affiliated home market customer, Mexinox Trading, sold a small quantity of the foreign like product during the POR. In the instant case, and given the totality of circumstances, we find these sales to Mexinox's only affiliated reseller, Mexinox Trading, to be the only sales relevant to determining whether Mexinox should report downstream sales for purposes of this review. We did not require Mexinox to report its downstream sales of Mexinox Trading since the sales to the single affiliated reseller are below the five percent threshold of Mexinox's total home market sales, while the sales to Fischer Mexicana were used entirely in the manufacture of non-subject products. See October 8, 2005, AQR at Attachment A-1 and March 7, 2005, Supplemental Questionnaire Response (SQR1) at Attachment A-15.

Finally, we note that while 19 CFR 351.403(d) highlights the conditions in which the Secretary may calculate NV based on the sales to affiliated parties, the regulation does not require the Department to base NV on such sales. In fact, we do not find it necessary or appropriate to require the reporting of downstream sales in all instances. We base the reporting requirements of downstream sales on a number of considerations which we analyze at each segment of the proceeding. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27356 (May 19, 1997). Consistent with past reviews of this order, we have found it unnecessary for Mexinox Trading to report its sales because of the small number of downstream sales in question. This determination is consistent with the Department's practice established in the first review of this

case. See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Administrative Review, 67 FR 6490 (February 12, 2002) (POR1 Final Results) and accompanying Issues and Decision Memorandum at Comment 11. Moreover, there is no further evidence on the record indicating that the exclusion of Mexinox Trading's sales would materially affect the accuracy of the margin calculation. Based upon the foregoing, we have not required Mexinox Trading to report downstream sales in this review.

**Adjustments to United States Price**

***Comment 3: U.S. Indirect Selling Expenses***

Petitioners argue that Mexinox's affiliated importer Mexinox USA's incurred indirect selling expenses (ISEs) have been understated and that certain revisions should be made to the indirect ISE numerator. As a component of ISE, petitioners maintain that the Department should properly make a bad-debt expense adjustment in accordance with the Department's methodology used in previous reviews. Petitioners suggest that Mexinox USA's ISE ratio should include "extraordinary" bad debt and reflect the five-year history of its bad debt experience. Petitioners argue that "extraordinary" along with "other" income are not permissible as offsets to ISEs. See Petitioner's Case Brief at 4.

Petitioners also maintain that the amount of the income related to revenue received from its affiliate ThyssenKrupp Nirosta North America (TKNNA) was properly excluded as an offset in the Preliminary Results. Petitioners argue that the Department's current policy disregards intra-company outlays (such as Mexinox USA's payment to Mexinox S.A for general services) as expenses. In the same manner, petitioners contend that intra-company receipts (such as this payment from TKNNA to Mexinox USA) should also be disregarded as income. See Petitioner Case Brief at 5. With regards to the "other" income relating to discounts on freight, petitioners argue that the amount likewise should not be allowed as an offset to ISEs because it does not relate to selling activities. Petitioners claim that accepting these freight discounts as an income offset would result in double counting of income. See Petitioner Case Brief at 5. Petitioners urge the total "other" income amount should not be accepted as an offset to indirect selling expenses for these Final Results.

Mexinox contends that the Department's exclusion of extraordinary bad debt expenses related to unforseen bankruptcies is correct and consistent with established practice in previous reviews. Mexinox notes that the Department based bad debt expenses on a five-year historical average in response to the fact that Mexinox had experienced both ordinary and extraordinary bad debt during those periods of review. Mexinox argues that such is not the case in this POR, since it did not incur extraordinary bad debt with respect to any customers. Mexinox thereby asserts there is no reason for the Department to apply its previous five-year averaging methodology for this review. Mexinox states that the exclusion of extraordinary bad debt is required by law and reflects firmly established Department practice in these reviews. See Mexinox's Rebuttal Brief at

6.

Mexinox contends that revenue categorized as "other" income should be permitted as offsets to expenses. The first major portion of the "other" income includes "extraordinary" income whereby a significant portion is derived from a payment Mexinox USA received from its affiliate, TKNNA, for administrative services Mexinox USA rendered on behalf of TKNNA. The remainder of "other" income consists of income related to discounts on freight charges. See Mexinox's SQR1 at 57.

Mexinox further contends that petitioners are factually incorrect. Mexinox asserts that extraordinary income reported as "other" income was never used as an offset to indirect selling expenses at any point in this proceeding. Mexinox argues that it specifically increased the total of U.S. indirect selling expenses by the amount of the "extraordinary" income to reverse the offset.

With respect to the "other" income offsets, Mexinox argues that the Department improperly excluded revenue received from a service contract between Mexinox USA and TKNNA as an offset to U.S. indirect selling expenses in the Preliminary Results. Mexinox states that income received from its service contract with its affiliate TKNNA legitimately relates to actual selling and administrative services which are included in the U.S. indirect selling expense numerator. Mexinox asserts that this particular offset has been accepted in other reviews, notably the 2001-2002 administrative review. In that review, Mexinox contends that the Department verified the service fee received from TKNNA. Mexinox argues that the expenses Mexinox USA incurred for providing these administrative services to TKNNA were included in Mexinox USA's ISE numerator in the Final Results of the 2001-2002 review. Accordingly the fees received for these services were allowed as an offset to expenses. See Mexinox Case Brief at 25, citing Stainless Steel Sheet and Strip in Coils from Mexico, 69 FR 6259 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 6.

Mexinox asserts that the facts of this arrangement between Mexinox USA and TKNNA remain the same in the current review. Mexinox believes the fee for the selling and administrative services provided to TKNNA during this review period reflect a fairly negotiated compensation for those services. See Mexinox Case Brief at 26. By disallowing the offset in the Preliminary Results, Mexinox contends, the indirect selling expenses are "grossly" overstated by Mexinox USA's sales of subject merchandise. Mexinox urges the Department to include the amount as an offset to U.S. indirect selling expenses for the Final Results. For the remaining portion of "other" income referencing discounts on freight charges, Mexinox states that this income amount should also be permitted as an offset. Mexinox contends that these freight discounts are included as income only once in its reporting, in connection with the ISE calculation. See Mexinox Rebuttal Brief at 10.

**Department's Position:** Pursuant to section 772(d)(1) of the Act, the Department makes adjustments to constructed export price (CEP) sales for U.S. indirect selling expenses. In this instance, because the expenses in question are foreseeable, we will continue to accept the bad debt provision and the income offset relating to freight discounts as reported by Mexinox in the calculation of the ISE ratio. With respect to the income received from the TKNNA service contract, we will not directly accept the income offset. However, we will adjust the overall ISE ratio to include expenditures and revenue associated with both Mexinox USA and TKNNA for these Final Results.

We base bad debt expense in connection with the ISEs on foreseeable expenses that are reasonably anticipated based on historical experience. In past reviews, Mexinox had incurred specific bankruptcy-related bad debt that the Department found to be extraordinary in nature. The Department excluded such extraordinary bad debt and based Mexinox USA's historical bad debt experience on a five-year period average prior to the POR. See Stainless Steel Sheet and Strip in Coils from Mexico; Notice of Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004) (POR3 Final Results) at Comment 6 and Stainless Steel Sheet and Strip in Coils from Mexico; Notice of Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (January 26, 2005) (POR4 Final Results) at Comment 6. During this POR, Mexinox did not incur extraordinary bad debt expenses with respect to any customers. As a result, the Department had no basis in this review to apply its previous five-year averaging methodology. In conjunction with the Department's standard practice, we have used Mexinox's bad debt provision in the ISE numerator. See Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil, 70 FR 7243 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6. For Mexinox, the bad debt provision represents an estimate of doubtful accounts based on Mexinox's historical experience. The bad debt provision therefore is the appropriate amount to be used in the sum of indirect selling expenses for purposes of the 2003-2004 POR.

The Department also finds no evidence of double-counting. The offset, with respect to freight discounts, is appropriate because this income amount was included only once when it was reported to the Department. Since the income was recorded in the miscellaneous account for "other (income) expenses" in connection with the ISE calculation, we have accepted the income offset with respect to freight discounts in the computation of the ISE ratio.

The Department does not accept the income offset reported in conjunction with the TKNNA service agreement. Rather, we have adjusted the ISE ratio to account for both TKNNA and Mexinox USA-related expenses and revenues. The record evidence of this review and the POR3 Final Results at Comment 6 indicate that Mexinox USA performed administrative functions on behalf of TKNNA and that those associated expenses are included in the ISE numerator. The service contract between TKNNA and Mexinox USA indicates that Mexinox USA provided selling and administrative services to TKNNA during this period of review and the associated expenses are reflected and recorded in Mexinox USA's books and records. We note that

TKNNA's corporate headquarters are located in the same offices as Mexinox USA and that the facts of Mexinox USA's arrangement with TKNNA have remained the same as in past reviews. The TKNNA contract, corresponding debit notes and transfer of funds were submitted on the record of this review and details the administrative services provided by Mexinox USA. See Mexinox's July 14, 2005, Supplemental Questionnaire Response (SQR3) at Attachment C-43. Even though TKNNA is not involved in the sales or distribution of merchandise from Mexinox USA to customers in the United States, the Department determines that Mexinox USA's total reported indirect selling expenses include a portion of TKNNA-related expenses.

The TKNNA contract lists the service charges negotiated and agreed upon by affiliated entities Mexinox USA and TKNNA. TKNNA's payment to Mexinox USA was based on these service charges and legitimately relate to the selling and administrative services provided. However, these fees cannot be linked directly to the actual expenses incurred. It is the Department's normal practice to calculate such ratios based on expenses incurred and sales revenue recognized (or cost of goods sold) during the same period of time. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 26. Since Mexinox USA included indirect selling expenses in conjunction with affiliate TKNNA, we find it appropriate to allocate the total selling expenses over the net sales revenue recognized by both Mexinox USA and TKNNA during the same time period. As a result, the Department has added TKNNA-related revenue in the denominator of the ISE ratio in these Final Results. See Final Analysis Memorandum dated December 6, 2005.

***Comment 4: Mexico-incurred Indirect Selling Expenses***

Petitioners state that the Department should recalculate indirect selling expenses incurred in Mexico to reflect a single ratio for all sales, regardless of market. Petitioners assert that Mexinox incorrectly attributed a smaller percentage of expenses to U.S. sales and argue that although direct expenses can be market specific, indirect expenses must be the same across all sales. See Petitioner's Case Brief at 8.

Mexinox argues that petitioners' assumption that indirect selling expenses are incurred equally across all markets is invalid, since selling functions can and invariably do vary considerably across markets. Specifically, Mexinox argues, it carries out only minimal and routine selling functions in Mexico that are related to its U.S. sales to Mexinox USA. In comparison, all the selling activities associated with home market and third country sales are carried out in Mexico. Moreover, the distinction between direct and indirect sales is based on whether the expense varies with the level of sales or if it is possible to tie expenses to particular sales. Mexinox states that the allocation of Mexican indirect selling expenses based on its separate accounts and cost centers is in accordance with the Department's standard policy and practice.

**Department's Position:** Pursuant to section 772(d) of the Act, we have accepted the allocation of indirect selling expenses as reported by Mexinox in our Final Results. The record indicates that more selling functions are performed by Mexinox for sales in the home market than for U.S. sales sold through its affiliate, Mexinox USA. Mexinox USA carries out all the selling functions and bears virtually all the expenses associated with administrative, accounting, logistical and other selling-related personnel in the United States. In comparison, Mexinox carries out all the selling activities associated with home market sales in Mexico. Mexinox provided an itemized list of its indirect selling expenditures for both markets and upon comparing the selling expenses of each market, we find most selling functions correspond to home market sales. See Mexinox's November 10, 2004, Questionnaire Response at Attachment B-18. We determine that Mexinox USA's selling functions for sales to the United States are less numerous and less advanced than Mexinox's sales to its home market customers, which include travel and representation expenses, advertising and promotions, materials, equipment and services, handling material, vehicle insurance and vehicle expenses. We find that Mexinox's distribution of ISEs between the two markets is reasonable and therefore have concluded that Mexinox performed fewer selling functions for its U.S. sales than it did for its home market sales. We have therefore used Mexinox's allocation of ISEs in these Final Results.

**Cost of Production**

***Comment 5: General and Administrative Expenses***

Petitioners argue that Mexinox's general and administrative (G&A) expenses must be calculated based on fiscal year 2004 financial statements and not on the 2003 fiscal year financial statements. According to petitioners, the 2004 fiscal year is the period that most closely corresponds to the period of review for this proceeding. See Petitioner's Case Brief at 9.

In addition, petitioners contend that the Department was correct in including employee profit sharing expense and expenses incurred on behalf of Mexinox Trading and excluding the income and expenses related to Mexinox's Tlalnepantla warehouse in the calculation of the G&A expense rate. According to petitioners, the Department has found that profit-sharing expenses are a part of production costs and therefore should be included in G&A expenses. In support of this position, petitioners cite the Notice of Final Determination of Sales at Less Than Fair Value: Light-walled Rectangular Pipe and Tube from Mexico 69 FR 53677 (September 2, 2004). Further, petitioners argue that the expenses incurred on behalf of Mexinox Trading should be included in the G&A expenses. See POR1 Final Results and accompanying Issues and Decision Memorandum at Comment 9, where the Department stated that: "with respect to expenses incurred by Mexinox on behalf of Mexinox Trading, we have examined the record and have determined that these expenses should be included in the numerator of Mexinox's G&A ratio. Our findings at verification demonstrate that the amount in question represented G&A expenses, not selling expenses as asserted by Mexinox." Petitioners note that while the Department in subsequent cases viewed the issue differently and determined that all expenses incurred by affiliated resellers should be selling expenses, the expenses at issue here were not incurred by affiliated resellers, but by Mexinox. Petitioners argue that Mexinox is simply trying to lower its

G&A expense by claiming that the expenses it incurred were on behalf of Mexinox Trading. See Petitioner's Rebuttal Brief at 3.

Finally, petitioners argue that the Department properly excluded the income and expenses related to a portion of Mexinox's Tlalnepantla warehouse expenses that were related to rentals. Petitioners assert that income from distribution operations is not related to production operations and, thus, is not appropriately accounted for in G&A.

Mexinox argues that the Department correctly used the 2003 fiscal year (i.e., the calendar year) financial statements to calculate Mexinox's G&A expense ratio because this was the most recently completed audited financial statement. Mexinox argues that petitioner's claim that the fiscal year 2004 financial statements more closely correspond to the POR is incorrect. Mexinox states that the POR (i.e., July 2003 through June 2004) equally spans both fiscal year 2003 and 2004. Mexinox argues that in order to ensure consistency and predictability, the Department should continue to rely on the reported G&A expenses based on fiscal year 2003 financial statements because the Department used fiscal year 2002 financial statements in the immediately preceding review. See Mexinox's Rebuttal Brief at 3-4.

Mexinox argues that the Department incorrectly included expenses related to employee profit sharing in G&A expenses. Mexinox contends that the employee profit sharing relates to a distribution of profits and is not an expense. Mexinox asserts that note 13 of its 2003 financial statements states that statutory profit sharing is not a period expense. According to Mexinox, the amount is determined at a percentage rate on the taxable income adjusted as prescribed by Mexican income tax laws. Thus, Mexinox argues that the statutory profit sharing is a distribution of Mexinox's taxable income which is regulated by the Mexican tax authorities and determined at the close of the fiscal year. Mexinox contends that the profit sharing is not an expense incurred in connection with the production of subject merchandise or any other operations of the company, but instead is akin to dividend distributions or income tax payments, neither of which are included in cost of production (COP) or constructed value (CV). Mexinox argues that the Department's consistent practice with respect to dividends and tax payments are to exclude them from the cost calculation because such payments relate to the level of income that a corporation realizes, not the expenses themselves. In support of this position, Mexinox cites Notice of Final Determination of Sales at Less Than Fair Value: High Information Content Flat-Panel Displays and Display Glass Therefore from Japan, 56 FR 32376, 32392 (July 16, 1991) and Notice of Final Results of Sales at Less Than Fair Value: Color Picture Tubes from Japan, 55 FR 37915, 37925 (September 14, 1990).

Furthermore, Mexinox argues that expenses incurred on behalf of Mexinox Trading should be excluded from Mexinox's G&A expense rate calculation. According to Mexinox, the Department excluded these expenses in the final determination in the original investigation and the Final Results in all but one of the administrative reviews. Therefore, Mexinox argues that the Department should exclude the expenses incurred on behalf of Mexinox Trading in this proceeding because the Department has repeatedly found that they are selling expenses, not G&A

expenses, and they are incurred on behalf of and for the benefit of Mexinox Trading and not Mexinox. According to Mexinox, the expenses at issue relate to salaries for persons involved in the G&A functions supporting the operations of Mexinox Trading, which is a distinct and separate sales entity engaged primarily in the purchase and resale of finished stainless steel products. Mexinox argues that all overhead expenses incurred by Mexinox Trading, including the expenses at issue that are booked by Mexinox, are properly classified as sales expenses. According to Mexinox, the Department followed this approach in the original investigation in which it stated "we agree with Mexinox that the expenses incurred on behalf of the selling subsidiaries should not be included in the calculation of the G&A expense ratio. In this final determination, we have removed them from the computation of total G&A expenses." See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico, 64 FR 30790, 30818 (June 8, 1999). Mexinox contends that while the Department reached a different decision in the 1999-2000 review, the following year, in the 2000-2001 review, not only did the Department determine that the expenses incurred on behalf of Mexinox Trading were properly excluded from the G&A expense ratio, but the Department also specifically noted in its conclusion in the 1999-2000 Final Results that, "to include these expenses in the G&A ratio was erroneous." See POR1 Final Results and accompanying Issues and Decision Memorandum at Comment 9.

Additionally, Mexinox argues that the revenue and expenses related to the portion of the Tlalnepantla warehouse that was rented out should be included in the G&A expense rate calculation. Mexinox contends that this exclusion is unwarranted and contrary to the Department's prior practice. According to Mexinox, the Department has previously considered this issue and agreed with Mexinox. Mexinox states that in the 2000-2001 administrative review, the petitioners argued that the Department should exclude both income and expenses related to the Tlalnepantla warehouse from G&A expenses because such "income from distribution operations is unrelated to production." According to Mexinox, the Department rejected this argument in the Final Results of that review noting that it "does not require G&A expenses relate only to the production of subject merchandise but rather considers those expenses related to the general operations of the company as a whole." See See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Administrative Review, 68 FR (February 11, 2003) (POR2 Final Results) and accompanying Issues and Decision Memorandum at Comment 11. Mexinox argues that the amounts at issue relate to the portion of the Mexico City warehouse that is not utilized by Mexinox for its distribution operation, and therefore, the income and expenses should be included in G&A expenses. Furthermore, Mexinox argues that the Department has used the G&A expenses as reported by Mexinox (inclusive of the Tlalnepantla warehouse revenue and expenses) in each and every prior segment of this proceeding and should do so in the Final Results of this review.

Next, Mexinox argues that "other expenses" should be excluded from the G&A expenses to avoid double counting the expenses. According to Mexinox, the Department added an amount to the G&A expense numerator for "other expenses". Mexinox argues that a portion of this "other expenses" amount was already included in the total G&A expenses submitted to the Department

by Mexinox under "other income/expenses." Mexinox argues that at most the Department should include only the amount actually excluded from the reported cost.

Further, Mexinox argues that the expenses related to "extraordinary operations" should be excluded from the G&A expenses. Mexinox asserts that almost all these expenses were already included in the reported G&A expenses, thereby causing the Department to double count these expenses, and the remaining extraordinary expenses were properly excluded from G&A expenses. Mexinox claims that it provided a breakdown of the extraordinary operations for the POR in Attachment A-40 to Mexinox's June 8, 2005, Supplemental Questionnaire Response. According to Mexinox, the largest amount within the detailed break down related to "production planning and market administration software" that was already included in the G&A expense rate calculation. Mexinox claims that the remaining portion of extraordinary expenses relates to "physical inventory effects of finished goods" and errors in the costing system. According to Mexinox, the Department has consistently upheld that inventory adjustments related to finished goods are not included in the COP. See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMS") from Taiwan, 64 FR 56308 (October 19, 1999) and accompanying Issues and Decision Memorandum at Comment 24, in which the Department states that "we did not include the write-down of finished goods, which is, conversely, more closely associated with the sale of the merchandise rather than the production of the merchandise." Finally, Mexinox states that the remaining small amount relates to the adjustment Mexinox made during the 2002/2003 administrative review to correct for an error in the costing system related to the allocation of transformation costs on Annealing and Pickling Line 2. According to Mexinox, the Department properly accepted the adjustment in the Final Results of the 2002/2003 review.

**Department's Position:** The Department determines COP pursuant to section 773(f) of the Act. In this instance, we agree, in part, with both Mexinox and petitioners. The fiscal year 2003 financial statements should be used to calculate Mexinox's G&A expense rate rather than the fiscal year 2004 financial statements because the 2003 financial statements closely correspond to this POR. It is the Department's practice to calculate general expenses, including financial expenses, based on the full fiscal year's information that most closely corresponds to the period of investigation or review. See, e.g., Final Results of Antidumping Duty Administrative Review and New Shipper Review: Stainless Steel Bar from India, 64 FR 13771, 13776 (March 22, 1999) and Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 63 FR 6899, 6906 (February 11, 1998). In situations where the POI is divided equally between two fiscal years, it has been the Department's practice to use the financial statements from the most recently completed fiscal year at the time the questionnaire response was submitted. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico, 67 FR 55800 (August 30, 2002) and its accompanying Issues and Decision Memorandum at Comment 7. This practice enables the Department to calculate the G&A and financial expense ratios on a consistent and predictable basis between countries and respondents. Moreover, the financial statements that include the first six months of the POI are on the record earlier in the investigation, which affords parties more time to review and comment on the data.

With respect to employee profit sharing, these expenses should be included in the G&A expenses. The Department's established practice is to include such expenses in the calculation of COP and CV. See, e.g., Porcelain-on-Steel Cookware from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 62 FR 25908, 25914 (May 12, 1997) and POR2 Final Results, and accompanying Issues and Decision Memorandum, at Comment 11. In the instant case, we determined that it was appropriate to include Mexinox's profit-sharing expense in the G&A expenses because it is an additional remuneration over and above the wages and salaries normally paid to employees. In other words, it is an additional expense incurred by Mexinox that benefits its employees for their contribution to the company. We disagree with Mexinox's argument that the profit-sharing expense is similar to profit, dividends, and income tax. Mexinox's profit-sharing expense is distinct from dividends in two key respects. First, Mexinox's profit-sharing payments represent a legal obligation that benefits employees and not a distribution of profits to the owners of Mexinox. Second, the right to participate in profit-sharing conveys no ownership rights in Mexinox. Further, Mexinox's profit-sharing expense is unlike income taxes paid to the government, in that profit sharing payments flow directly to employees. Also, Mexinox's income tax is based on taxable income that is net of Mexinox's profit-sharing expense. As such, consistent with the Preliminary Results, we have continued to include employee profit sharing expense in the G&A expense rate calculation.

We find that expenses incurred on behalf of Mexinox Trading should have been excluded from the calculation of the G&A expense ratio in the Preliminary Results. In the Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Mexico, 64 FR 30790, 30818 (June 8, 1999), we stated, "we agree with Mexinox that the expenses incurred on behalf of the selling subsidiaries should not be included in the calculation of the G&A expense ratio. In this final determination we have removed them from the computation of total G&A expenses." Then, in POR1 Final Results and accompanying Issues and Decision Memorandum at Comment 9 we stated that "with respect to expenses incurred by Mexinox on behalf of Mexinox Trading, we have examined the record and have determined that these expenses should be included in the numerator of Mexinox's G&A ratio. Our findings at verification demonstrate that the amount in question represented G&A expenses, not selling expenses as asserted by Mexinox." We refined our view in the POR2 Final Results and accompanying Issues and Decision Memorandum, at Comment 11, where we stated "we agree with Mexinox that expenses incurred on behalf of Mexinox Trading are properly excluded from the calculation of the G&A ratio, as it is the Department's practice to treat all expenses incurred by affiliated resellers as selling expenses." While the expenses at issue are G&A expenses, they were incurred on behalf of Mexinox Trading and recorded in Mexinox's books and records for reasons of administrative convenience. Further, record evidence supports the fact that Mexinox is reimbursed by Mexinox Trading for the expenses. See Mexinox's SQR1 at 41. Therefore, we have excluded the expenses incurred by Mexinox on Mexinox Trading's behalf from the G&A expenses for the Final Results in this proceeding consistent with the prior review.

For the Preliminary Results, we excluded the expenses and income related to the portion of Mexinox's Tlalnepantla warehouse expenses related to rentals. However, upon further review, we disagree that the expenses and income related to the rented portion of the warehouse should be removed from Mexinox's G&A expenses and have included these for the Final Results. The Department does not require G&A expenses to relate only to the production of subject merchandise but rather considers those expenses related to the general operations of the company as a whole. In this instance, the record indicates that Mexinox did not fully utilize its Tlalnepantla warehouse for its own operations (which it included as part of warehousing expense). In order to recover some of the costs incurred at this underutilized warehouse, Mexinox rented the unused portion to other companies. Thus, consistent with prior proceedings where we included both the expenses and income related to the rental of the Tlalnepantla warehouse (see POR2 Final Results, and accompanying Issues and Decision Memorandum, at Comment 11) we have continued to include the minor amount of expenses and income in the current review.

Finally, we agree with Mexinox with respect to the treatment of "other expenses" and "extraordinary operations." In the Preliminary Results, we included these expenses in the calculation of Mexinox's G&A expense ratio. We re-examined the record with regard to these expenses and found that most of the other expenses were already included as "other income/other expenses" in the calculation of the G&A expense ratio, and were therefore double counted. Therefore, we have only included the other expenses which had been previously excluded in calculating the revised G&A expense ratio for the Final Results. We also found that almost all of the extraordinary operations expenses were already included in the reported G&A expenses and, therefore were being double counted. We found that the remaining extraordinary expenses were properly excluded from G&A. Mexinox appropriately excluded expenses related to physical inventory effects of finished goods and an amount which relates to the adjustment Mexinox made during a prior period to correct for an error in the costing system. Therefore, we have adjusted the G&A expense ratio accordingly.

***Comment 6: Adjustment to Major Input Analysis***

Petitioners argue that the Department must apply the major input test correctly and adjust Mexinox's reported raw material costs to reflect the higher of cost, transfer price or market price. According to petitioners, Mexinox obtained hot-rolled stainless steel, a major input, from affiliated suppliers, but failed to adjust its reported costs according to the Department's major input test. Petitioners allege that for a certain grade of hot rolled stainless steel purchased by Mexinox, which represents the largest volume purchased of all grades, the market price was higher than the transfer price. Petitioners argue that each major input purchased from affiliates should reflect the highest amount from among cost, transfer price, or market price.

Mexinox argues that the Department applied the major input rule correctly. Mexinox contends that petitioners base their allegation on a claim that the Department compared the transfer price only to the COP and failed to consider the market price. According to Mexinox, the Department

compared the transfer price from affiliates to both the COP and the market price in reaching its determination. Mexinox argues that the record clearly shows that the transfer price (i.e., the reported value) was found to be slightly higher than both the COP and market price for both austenitic and ferritic/martensitic grades; thus, Mexinox contends, no adjustment is warranted.

**Department's Position:** For purposes of section 773(f)(3) of the Act, the Department normally will determine the value of a major input purchased from an affiliated person based on the higher of: a) the price paid by the exporter or producer to the affiliated person for the input; b) the amount usually reflected in sales of the major input in the market under consideration; or c) the cost to the affiliated person of producing the major input. See 19 C.F.R. 351.407(b). Therefore, in the instant case, because hot rolled stainless steel is a major input, under section 773(f)(3) of the Act, we compared the transfer price, market price and COP for the product obtained from affiliates. We noted the COP for certain grades exceeded the reported transfer price between affiliates and we therefore adjusted the transfer price of those grades to reflect the actual COP accordingly. See Cost Calculation Memorandum from Laurens van Houten to Neal Halper, Director Office of Accounting, dated December 6, 2005, Re: Cost Adjustments.

***Comment 7: Financial Expense Calculation***

For the Preliminary Results, the Department adjusted Mexinox's consolidated financial expense rate calculation to exclude other interest income, to include miscellaneous net financial expenses, and to exclude packing expenses. Mexinox disagrees with each of these adjustments to their consolidated financial expense rate calculation. First, Mexinox believes its submissions fully corroborate that the other interest income taken as an offset to financial expenses was indeed generated based on short-term assets. Mexinox notes that the reported financial expense rate was based on the consolidated financial statements of their parent company, TKAG. Consequently, the interest income is extracted from the financial data of multiple entities. Mexinox maintains that TKAG provides guidance to each consolidating entity to ensure the uniformity of the accounting information conveyed to the parent company. As such, Mexinox argues that the internal TKAG accounting publication (i.e., the guidelines provided to the consolidating entities), submitted for the record in this case, demonstrates that the accounts in question consisted of short-term interest income. As an alternative to a rejection of the entire amount, Mexinox suggests that the Department allow a partial short-term interest income offset calculated in the same manner as done in past reviews.

Second, Mexinox argues that "miscellaneous financial expense" is not interest-related, therefore, it should not be included in the net interest expense ratio. Because TKAG's independent auditors classified "miscellaneous financial expense" as "Other financial income/(loss)" and presented the amount outside of the "Interest expense, net" section of the income statement, Mexinox concludes that the amount is clearly not interest-related. Thus, Mexinox believes that the Department should exclude miscellaneous financial expense from the net interest expense ratio in the final determination.

Third, Mexinox disagrees with the Department's exclusion of packing expenses from TKAG's denominator to the consolidated financial expense rate calculation. For the Preliminary Results, the Department used a ratio of Mexinox's packing to cost of sales to extrapolate the amount of packing expenses included in TKAG's cost of sales. While Mexinox recognizes the Department's intention to ensure that the denominator and the amount to which it is applied are on the same basis, Mexinox disagrees with the methodology employed by the Department. Mexinox points out that TKAG's consolidated financial statements are comprised of information from multiple entities engaged in a disparate array of business activities. Consequently, Mexinox argues that it is not reasonable to apply its own unique experience as a stainless steel producer to this diverse group of companies. As an alternative for the final determination, Mexinox proffers that applying a financial expense rate unadjusted for packing to a packing inclusive per-unit total cost of manufacturing (TOTCOM) would more reasonably reflect the Mexinox's own experience.

Petitioners argue that the Department's methodology for calculating the financial expense rate in the Preliminary Results was reasonable and should be sustained. Petitioners state that in each prior segment of this proceeding Mexinox has offset financial expenses with total interest income, while the Department, based on its own analysis performed in-house and at various verifications, has continued to reject components of this offset for failing to be short-term interest income. Thus, while Mexinox proffers in its brief an alternative short-term interest income offset calculation, petitioners believe it would not be inappropriate for the Department to exclude the entire reported offset since Mexinox has once again failed to accurately recalculate its interest income offset. However, should the Department wish to provide Mexinox with another option, petitioners state that the Department could estimate short-term interest income using Mexinox's reported short-term interest rate applied to TKAG's short-term assets, as done by the Department in the prior segment of this proceeding.

Regarding the miscellaneous financial expenses, petitioners find that only one item - the gain on the disposal of securitized assets - may not be a valid component of Mexinox's financial expense rate numerator. Petitioners believe that securities are long-term assets; therefore, the long-term gains on such assets should not be used to offset financial expenses. Petitioners find that Mexinox's argument that only interest expenses, not other financial expenses, are to be included in the reported costs to be incorrect. Regardless of how Mexinox chooses to classify the other financial expenses, petitioners argue that the expenses need to be captured in the reported costs - if not as financial expenses, then as G&A expenses.

Finally, petitioners argue that since Mexinox failed to account for the actual packing expenses included in TKAG's cost of sales denominator to the financial expense rate, the Department's use of an extrapolated amount for packing expenses was warranted.

**Department's Position:** The Department calculates COP pursuant to section 773(f) of the Act. In this instance, we disagree with Mexinox's arguments regarding the financial expense rate calculation. First, we note that in the Preliminary Results, the Department excluded only that

portion of Mexinox's reported short-term interest income offset that was related to accounts receivables. As Mexinox correctly points out, additional information was provided in the current review regarding the characterization of the "other interest and similar income" shown on TKAG's financial statements (i.e., the amount considered short-term interest income for purposes of calculating the financial expense rate). See Mexinox's June 8, 2005, Supplemental Questionnaire Response at Attachment D-39. Using this information, we identified a portion of the "other interest and similar income" that was not an appropriate offset to financial expenses. This portion pertained to interest and penalties earned on accounts receivables. Since it is sales-related, we have excluded the amount from the calculation of the COP for the Final Results. This is consistent with our past practice, see Notice of Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38756, 38791 (July 19, 1999) where we stated that "we disagree with USIMINAS that interest income earned on accounts receivable should be included as an offset to interest expense. Interest charged to customers relating to specific sales [is] more appropriately treated as a selling expense." In other words, the interest income earned from customers is directly attributable to specific sales transactions. Regarding the parties' references to prior review calculations, we note that in past cases it was necessary for the Department to estimate that portion of TKAG's total interest income that was eligible as an offset to financial expenses (i.e., short-term in nature and unrelated to sales). However, based on the detailed information provided in the current review, an estimate was unnecessary as the Department was able to review the components of the total offset and specifically identify the short-term interest income that was appropriate for offset against financial expenses.

Next, regarding net miscellaneous expenses, we note that the consolidated financial expense rate is intended to capture the net cost of a company's financing activities. Based on Mexinox's submissions, TKAG's net financial expense category included exchange gains and losses on financial transactions and gains and losses on the disposals of securitized assets (receivables). The Department finds that these items are appropriately categorized as financing costs of the company. We disagree with the petitioner's identification of the gains and losses on TKAG's securitized assets (receivables) as long-term investments. "An industrial corporate may securitize the trade accounts receivables that are generated when its product is sold." See "Demystifying Securitization for Unsecured Investors" by Annika Sandback, Moody's Investors Service, Inc., January 2003, Report No. 77213 n.3. Thus, selling the future cash flows of its receivables to investors is another source of funding operations that is available to a company. These expenses are not attributable to specific sales transactions but instead are related to management's decision to use its accounts receivable as a financing source. As such, the gains and losses on the disposals of TKAG's securitized accounts receivables are appropriately considered financing activities, not long-term investments.

Finally, regarding packing expenses, it is the Department's normal practice to exclude packing expenses from its financial expense rate calculation. Due to the large number of entities that make up TKAG's structure, the amount of packing expenses included in TKAG's cost of sales denominator could not be isolated. Consequently, we continue to maintain that using a ratio of

Mexinox's packing cost to its cost of sales (and applying the ratio of TKAG's cost of sales to estimate TKAG's packing costs) is a reasonable approximation of TKAG's packing expenses, absent any quantification of TKAG's actual experience. We note that this methodology has been consistently applied in the past reviews under this order. See Stainless Steel Sheet and Strip in Coils from Germany: Notice of Final Results of Antidumping Duty Administrative Review, 69 FR 75930 (December 20, 2004), and accompanying Issues and Decision Memorandum, at Comment 3, and Stainless Steel Sheet and Strip in Coils from Germany: Notice of Final Results of Antidumping Duty Administrative Review, 69 FR 6262, (February 10, 2004), and accompanying Issues and Decision Memorandum, at Comment 3.

**Margin Calculations**

***Comment 8: Offsetting for Export Sales that Exceed Normal Value***

Mexinox argues the Department should not have assigned a zero dumping margin for sales to the United States made at or above NV. Mexinox maintains that there is no provision in the U.S. statute which requires zeroing and refer to recent CIT rulings affirming this. Citing inter alia, Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp. 2d 1253 (CIT 2003) (Corus Staal I), and PAM, S.p.A. v. U.S. Department of Commerce, 265 F. Supp. 2d 1362 (CIT 2003) (PAM), and Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 (CIT August 27, 2003), Mexinox asserts the CIT has found the statute is silent with respect to the Department's practice of setting negative margins to zero. Moreover, Mexinox claims, in PAM the CIT upheld the Department's practice of setting negative margins to zero as a "reasonable gap-filling" interpretation of the statute under Chevron U.S.A., Inc. V. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) (Chevron). See Mexinox Case Brief at 34. Mexinox also refers to Timken Co. v. United States, 354 F. 3d 1334, 1340-42 (Fed. Cir. 2004) (Timken), in which it argues the Federal Circuit explicitly stated the statute does not require the Department to assign a margin of zero to non-dumped sales. Mexinox contends that in Timken, the Federal Circuit disagreed that the word "exceeds" (as used in the statutory definition of "dumping margin" in section 771(35)(A) of the Act) limited the definition of "dumping margin" to positive numbers. See Mexinox Case Brief at 35. Mexinox claims that the Department has adopted the practice of setting negative margins to zero as a matter of interpretive gap-filling and is obligated to exercise its gap-filling authority in a manner consistent with international law.

Mexinox maintains that the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron. However, Mexinox argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. Mexinox avers that Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) (Hyundai Electronics) is instructive on this point. In Hyundai Electronics, Mexinox notes, the CIT contemplated a revocation standard promulgated by the Department that recently had been rejected by a WTO panel. Mexinox asserts that while the CIT eventually found it was possible to reconcile the Department's revocation standard with the WTO Antidumping Agreement (Antidumping Agreement), the CIT stressed that Chevron and Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming

Betsy) must be applied in concert when the latter is implicated. See Mexinox Case Brief at 36, citing Hyundai Electronics, 53 F. Supp. 2d at 1344.

Mexinox asserts that the same analysis must be applied in this case. Since the statute is silent with respect to setting negative margins to zero and the Department has adopted this practice as an interpretation of the statute, Mexinox claims, the relevant question is whether the Department's interpretation is compatible with the Antidumping Agreement. Mexinox contends that the WTO Appellate Body's decision in European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India) and more recently in United States Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (Softwood Lumber from Canada) establishes that the Department's practice is not compatible with the Antidumping Agreement. Specifically, Mexinox asserts, in Bed linen from India the WTO Appellate Body upheld a WTO Panel decision finding that the European Communities had acted inconsistently with Article 2.4.2 of the Antidumping Agreement by "zeroing" negative price differences in calculating the aggregate dumping margin. Mexinox contends that in Softwood Lumber from Canada, in which the United States was the appellant, the WTO Appellate Body upheld a WTO Panel decision that the Department's practice of assigning a margin of zero to individual non-dumped sales and including these zero margins in the calculation of aggregated overall margins violates Article 2.4.2 of the Antidumping Agreement. Mexinox argues that the WTO Appellate Body also found in Softwood Lumber from Canada that Articles 2.2.1 and 9.4 of the Antidumping Agreement clearly establish circumstances in which certain sales may be disregarded. Mexinox maintains that Article 2.4.2 of the Antidumping Agreement does not contain such explicit language allowing an investigating authority to disregard sales at or above NV, thereby prohibiting the Department's practice of assigning a margin of zero to individual non-dumped sales.

Mexinox concludes that U.S. law does not require the Department to set negative margins to zero and there is no direct conflict between U.S. and international law. Furthermore, Mexinox argues, under the Charming Betsy doctrine, the Department is required by law to interpret the statute in such a way that does not violate the Antidumping Agreement.

Petitioners argue that the Department should reject Mexinox's arguments concerning the Department's methodology of assigning a margin of zero to non-dumped sales. Petitioners assert that the Department has repeatedly declined to follow the WTO Appellate Body's decision in Bed Linen from India, despite Charming Betsy. Petitioners urge the Department to once again reject Mexinox's arguments that U.S. court decisions do not support the Department's zeroing practice, as such claims are not accurate. Citing to Softwood Lumber from Canada, petitioners assert this case's decision is limited to the Department's policy of assigning a margin of zero to non-dumped sales as applied to the specific facts of the antidumping investigation of softwood lumber from Canada, and is not a WTO ruling on the Department's policy as such. See Petitioners' Rebuttal Brief at 14. Petitioners assert that in the investigation of softwood lumber from Canada, the Department first computed weighted-average dumping margins at the product-type level and then aggregated these to compute weighted-average margins at the sub-group level before calculating an overall weighted-average margin. Thus, petitioners hold, in that case the

Department assigned a zero margin to non-dumped sales at two levels of the antidumping analysis, "thereby effectively compounding the effects of zeroing." See Petitioners' Rebuttal Brief at 14. Petitioners maintain that the WTO Appellate Body made it clear that its ruling was confined to the particular facts of the investigation regarding softwood lumber from Canada. Therefore, petitioners assert, that particular decision is not controlling. Citing Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures On Certain Softwood Lumber Products From Canada, 70 FR 22636, 22640 (May 2, 2005) (Softwood Lumber Determination Under Section 129), Petitioners assert the Department brought its determination into compliance with the WTO's decision by switching to a transaction-to-transaction methodology and rejected the Canadian respondent's argument that the new methodology was also inconsistent with the WTO's ruling.

Furthermore, petitioners argue that the WTO Appellate Body's decision in Softwood Lumber from Canada does not apply to the Department's policy of setting negative margins to zero in administrative reviews, citing Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews, 70 FR 9271 (February 25, 2005) and the accompanying Issues and Decision Memorandum at Comment 6. Petitioners assert that in administrative reviews, transaction-specific prices of U.S. sales are compared to weighted - average prices of comparison market sales. In Softwood Lumber from Canada, petitioners claim, the WTO Appellate Body referred to this methodology as the "weighted-average-to-individual methodology" and clearly stated it was not considering this methodology in that ruling. See Petitioners' Rebuttal Brief at 16. According to petitioners, in Timken, which pertained to an administrative review, the Federal Circuit upheld numerous CIT decisions which found the Department's policy of assigning a zero margin to non-dumped sales to be reasonable and in accordance with law. Petitioners assert that in Timken, the Federal Circuit held that the Department had reasonably interpreted the statutory definition of "dumping margin" as permitting the Department to assign a margin of zero to non-dumped sales. Petitioners contend that this precedent is binding on the Department, and there is nothing in the WTO Appellate Body's decision in Softwood Lumber from Canada which detracts from this. See Petitioners' Rebuttal Brief at 17.

Petitioners claim that the Department's responsibility is to interpret the statute, which often requires the Department to fill gaps Congress has either intentionally or inadvertently left in the statute. Petitioners maintain that the courts have long recognized the Department's interpretation and application of the statute is given special deference, citing Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983). Even if a WTO decision found the Department's general policy on assigning a margin of zero to non-dumped sales to be contrary to international law, petitioners contend, the Department would not be permitted to change its policy without invoking the procedures required by 19 U.S.C. section 3533. Petitioners assert that under 19 U.S.C. section 3533(g), WTO decisions are not "supreme law" in the United States and can only by implemented after careful and deliberate evaluation by Congress and the affected agency.

**Department's Position:** We disagree with Mexinox and have not changed our calculation of the weighted-average dumping margin for the Final Results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See, e.g., Notice of Final Results of Antidumping Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 4; Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand, 69 FR 61649 (October 20, 2004) and accompanying Issues and Decision Memorandum at Comment 7; and Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004) and accompanying Issues and Decision Memorandum at Comment 8.

The Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute. See Timken v. United States, 354 F.3d 1334, 1342-43 (Fed.Cir. 2004) (covering an antidumping administrative review of tapered roller bearings from Japan). More recently, the CAFC again affirmed the Department's methodology as consistent with the statute with respect to an antidumping investigation in Corus Staal II. The Court in Corus Staal II held that the Department's interpretation of section 771(35) of the Act to permit this methodology was permissible whether it be in the context of an administrative review or investigation. See Id. at 7.

With regard to Mexinox's argument concerning the WTO Appellate Body report in Softwood Lumber from Canada, at the instruction of the United States Trade Representative, the Department implemented the WTO report on May 2, 2005, pursuant to section 129 of the URAA. Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005). Under section 129, the implementation of the WTO report affects only the specific administrative determination that was the subject of the dispute before the WTO, namely the antidumping duty investigation of softwood lumber form Canada. See 19 U.S.C. 3538. The implementation of Softwood Lumber from Canada has no bearing on this or any other antidumping duty proceeding. See Corus Staal v. United States, 387 F. Supp. 2d 1291, 1299-1300 (CIT 2005). Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

***Comment 9: Circumstance of Sale Adjustment***

Mexinox maintains that although the Department properly granted Mexinox a CEP offset pursuant to Section 773 of the Act, it should not have limited the amount of the CEP offset to the amount of indirect selling and inventory carrying expenses deducted from CEP. Mexinox argues that this amount, referred to as the "CEP offset cap," prevents the Department from making a fair comparison between the U.S. price and foreign market price. To ensure a fair comparison is made, Mexinox urges the Department to grant a circumstance of sale adjustment for indirect selling and inventory carrying expenses beyond the CEP offset amount, claiming that such an

adjustment would account for differences affecting price comparability.

Mexinox argues that granting such an adjustment is in accordance with both U.S. statute and international law. Citing to Article 2.4 of the WTO Antidumping Agreement to which the United States is a party, "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." See Mexinox Case Brief at 28, citing Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2.4. Mexinox infers that the WTO does not limit the amount of the adjustments made to NV in establishing its comparability to the CEP.

Mexinox also maintains that, U.S. statute does not restrict a circumstance of sale adjustment in this case, claiming such an adjustment is permitted under section 773(a)(6)(c)(iii) of the Act. Citing the statute, Mexinox claims that part of NV "should be increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and {NV} (other than a difference for which allowance is otherwise provided under this section that is established to the satisfaction of the administering authority to be wholly or partly due to . . . differences in the circumstances of sale." See Mexinox Case Brief at 29 citing 19 U.S.C. 1677b(a)(6)(C)(iii). In support of this, Mexinox refers to Budd Co., Wheel & Brake Div. v. United States 746 F. Supp. 1093, 1100 (CIT 1990) (Budd Co), where the Department applied a circumstance of sale adjustment to NV in accounting for distortions caused by hyperinflation in Brazil's economy which occurred between the date of sale and date of shipment. The Court determined a circumstance of sale adjustment was necessary to enable a fair comparison. Mexinox argues that under U.S. law, the Department's most important obligation is to establish comparability between the U.S. price and NV, and as a result the Department should use the circumstance of sale provision to ensure a fair price comparison is made.

Mexinox acknowledges that the Department often limits such circumstances of sale adjustments to direct expenses; however, Mexinox contends that if a circumstance of sale adjustment is granted for these Final Results, the Department should not limit the circumstance of sale only to direct expenses. See Mexinox Case Brief at 31.

Petitioners assert that a circumstance of sale adjustment is not justified for differences in indirect selling expenses. Petitioners argue the Department should once again reject Mexinox's argument as it has in the second and fourth administrative reviews of this order. Petitioners assert that the alleged differences in expenses between the United States and home market are embellished and overstated by Mexinox. Petitioners cite the description of CEP offset as stated in 19 U.S.C. 1677b(a)(7)(B), arguing that the cap is a statutory requirement that should not be ignored simply because Mexinox contends it prevents the Department from making a fair comparison. Petitioners also argue that Mexinox ignores section 773(a)(7) of the Act which specifically addresses additional adjustments dealing with level of trade and the capped CEP offset. Petitioners maintain this statute limits ISE adjustments.

With regards to restricting circumstance of sale adjustments to direct selling expenses, petitioners urge the Department to uphold its established practice under 19 CFR 351.410(b) and limit circumstance of sale adjustments to direct selling expenses. See Petitioners Rebuttal Brief at 12. Petitioners therefore argue that the Department should reject Mexinox's argument for a circumstance of sale adjustment to alleged indirect selling expense differences, and rather recalculate the reported expense ratio the same for all markets.

**Department Position:** We disagree with Mexinox. We note that U.S. law, as implemented through the URAA, is fully consistent with WTO obligations. See SAA at 669. Our practice, which is consistent with the most recently completed segment of this proceeding, is to focus exclusively on the claimed adjustment with respect to the requirements of U.S. law and not those of the WTO Agreement. See POR4 Final Results.

Section 773(a)(7)(B) of the Act establishes that, in making the CEP offset adjustment, the Department will reduce NV "by the amount of indirect selling expenses incurred in the country in which {NV} is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D)." See also section 351.412(f)(2) of the Department's regulations. This represents a specific statutory and regulatory limitation on the Department's authority to make adjustments for differences in indirect selling expenses, a limitation that is not overridden by the general authority in section 773(a)(6)(C)(iii) of the Act to make adjustments for differences in circumstances of sale, as Mexinox suggests.

Moreover, the Department's regulations at section 351.410(b) support our conclusion that section 773(a)(6)(C)(iii) of the Act cannot be used to circumvent the specific statutory and regulatory limitation with respect to adjustments for differences in indirect selling expenses. Section 351.410(b) indicates that adjustments for differences in circumstances of sale under section 773(a)(6)(C)(iii) will not be made for anything other than direct selling expenses, assumed expenses, and certain commissions. Specifically, section 351.410(b) of the regulations states that, "with the exception of the allowance described in paragraph (e) of this section concerning commissions paid only in one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses."

As defined in section 351.410(c) of the Department's regulations, direct selling expenses consist of expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." Section 351.410(d), in turn, defines assumed expenses as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." The Department treats all other selling expenses as indirect expenses unless the respondent establishes that the expense in question is direct in nature. See, e.g., RHP Bearings v. United States, 875 F. Supp. 854, 859 (CIT 1995). ISEs and inventory carrying costs are, by their very nature, indirect expenses; they are incurred regardless of whether a sale is made.

In response to the Department's granting a circumstance of sale adjustment in Budd Co., the Department finds the facts of this case differ greatly since Mexico did not experience hyperinflation over the POR. However, in conjunction with decisions reached in Budd Co., the Department maintains that the use of circumstance of sale adjustments should not be used to achieve unfair results. See Budd Co., 746 F. Supp. at 1100. Based on information on the record and in accordance with 19 CFR 353.15(a), we find Mexinox has not reasonably demonstrated any significant differences between markets to warrant such an adjustment in this review. Therefore, we have not made an additional circumstance of sale adjustment to NV with respect to indirect selling expenses beyond the amount of the CEP offset cap in these Final Results.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the Final Results of the review and the final weighted-average dumping margin for Mexinox in the Federal Register.

AGREE _____ DISAGREE _____

_____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____

Date